Supreme Court U. S.
FILED
JAN 17 1900
JAMES H. McKENNEY,
Clerk.

No. 104.

Brf. for [redacted]

Filed Jan. 17, 1900.

IN THE SUPREME COURT OF

THE UNITED STATES.

JOHN E. ROLLER, PLAINTIFF IN ERROR,

vs.

STEPHEN HOLLY,
WILLIAM HOLLY,
JOSEPH PEEPLES,
ET AL. } DEFENDANTS IN ERROR.

BRIEF OF APPELLEES,

PEEPLES,
WILLIAMS, AND
JACKSON.

[redacted]

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JOHN E. ROLLER,
Plaintiff in error,
vs.
STEPHEN HOLLY,
WILLIAM HOLLY,
JOSEPH PEEPLES,
ET AL.

In the Supreme Court of the United States.

—o—

To the Hon. the Supreme Court of the United States:

The Appellees in this cause respectfully submit as a counter proposition to Appellant's first assignment of error:

That the original judgment in the case of McClintic & Procter vs. John E. Roller, rendered in the District Court of Limestone county, Texas, is a valid judgment, and is not obnoxious to the objection that the service of citation upon the present Appellant was in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF FACTS FROM THE RECORD UPON WHICH THIS PROPOSITION IS FOUNDED.

The Appellant, John E. Roller, bought the land in controversy in this cause from Jordon and wife on January 3rd, 1887, and gave as part payment therefor his note for $216.17, bearing 10 per cent interest per annum from date, due November 1st, 1890, which note and deed from Jordan and wife to Roller specially retained the vendor's lien to secure said note and interest, the remainder of the purchase money notes to W. P. Brown, having been paid in full. McClintic & Procter became the purchasers of the above note of $216.17; that at the time McClintic & Procter filed their suit against Appellant—he was a citizen of Virginia; that Appellant was served in this suit by having delivered to him in person a certified copy of the citation together with a certified copy of Plaintiff's petition for five days exclusive of the day of service and the first day of court; and on default day, which was the 5th day of the term of court, the Defendant in said suit, John E. Roller, failing to appear, judgment was rendered against him by default for the amount of the note, interests and costs, with a foreclosure of the vendor's lien on the land, upon which it was a lien, and ordering its sale to satisfy the judgment. It required four days for a letter to come from Harrisonberg, Virginia, to Groesbeeck, Texas. [See Record, pp. 34 and 35.]

AUTHORITIES UNDER THIS PROPOSITION AND STATEMENT.

Sayles' Texas Civil States, Vol. 1, p. 417 and Art. 1228 and p. 418, Art. 1230 and Art. 1234, and Arts. 1280-1281 and 1282 and 1340.

Battle vs. Carter, 44 Tex., p 485.

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John E. Roller vs. Stephen Holly, 35th S. W. Rep., p. 1074.
Hewitt vs. Thomas, 46th Tex., p. 232.
Oswald vs. Kampmann, 28th Fed. Rep., 36.
Martin vs. Pond, 30th Fed. Rep., p. 15.
Pennoyer vs. Neff, 95 U. S., pp. 572 and 573.
Heinritter vs. Elizabeth Oil Cloth Co., 112 U. S., p. 294.
Arnt vs. Griggs, 134 U. S., p. 316.
American and Eng. Ency. of Law, Vol. 22, p. 143.

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ARGUMENT UNDER THIS PROPOSITION.

In Appellant's petition for writ of error, on page 34, he states that the time for service of process at the date of McClintic & Procter's suit was five days exclusive of the day of service and return day, which is correct, and we therefore do not quote the Texas statute on this subject, found in Art 1228 of Sayles' Texas Civil Statutes, but in accordance with the requirements of the rules of this Hon. Court, we quote Art. 1230 and Art. 1234, 1280–1281 and 1282 and 1340, referred to above.

Art. 1230 reads thus—

"Where the Defendant is absent from the state, or is a non-resident of the state, the clerk shall upon the application of any party to the suit, his agent or attorney, address a notice to the defendant requiring him to appear and answer the Plaintiff's petition at the time and place of the holding of the court, naming such time and place. Its style shall be, "The State of Texas," and it shall give the date of the filing of the petition, the file number of the suit, the names of all the parties, and the nature of the Plaintiff's demand, and shall state that a copy of the Plaintiff's petition accompanies the notice. It shall be dated and signed and attested by the clerk, with the seal of

the court impressed thereon, and the date of its issuance shall be noted thereon; a certified copy of the Plaintiff's petition shall accompany the notice."

Art. 1234 reads thus—

"Where a Defendant has been served with such notice, he shall be required to appear and answer in the same manner and under the same penalties as if he had been personally served with a citation within this state."

Art. 1280 reads thus—

"The fifth day of each term of the District Court and the third day of each term of the County Court are termed appearance days."

Art. 1281 reads thus—

"It shall be the duty of the court on appearance day of each term, or as soon thereafter as may be practicable, to call in their order all cases on the docket which are returnable to such term."

Art. 1282 reads thus—

"Upon the call of the appearance docket, or at any time after appearance day, the Plaintiff may take judgment by default against any defendant who has been duly served with process and who has not previously filed an answer."

Art. 1340 reads thus—

"Judgments for the foreclosure of mortgages and other liens shall be, that the Plaintiff recover his debt, damages and costs, with a foreclosure of the Plaintiff's lien on the property subject thereto, and (except in judgments against executors, administrators and guardians) that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the

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same as under execution, in satisfaction of the judgment; and if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the defendant, as in case of ordinary executions."

These articles from Sayles are the law of Texas to-day, except that to-day there must be ten days service, exclusive of the day of service and return day, and except appearance-day, which is now on the 2nd day of court. Under Texas decisions, which have become rules of property in this state, the Supreme Court, in the case of Foster vs Powers, 64th Tex., p. 247, it is held that when a vendor reserves in his deed an express vendor's lien to secure the purchase money, the superior title to the land is in the vendor, and a subsequent vendee in possession is not a necessary party to a suit to foreclose an express lien reserved in a deed to his vendor, and the purchaser at sheriff's sale under the judgment of foreclosure, though a third party, may maintain trespass to try title against such subsequent vendee in possession, who was not a party to the suit to foreclose.

The case of McCamly vs. Waterhouse, 80th Tex., p. 340 establishes the proposition that the legal assignment by the payee in a vendor's lien note carries with it the lien as incident to the debt. There are many Texas cases to the same effect. [See Buckler's 1 Civil Digest, Vol. 3, page 359, Art. 75.] Under these decisions McClintic & Procter, as the assignees of Appellant's note to Jordan and wife, held the lien that Jordan and wife had on the land against Roller and his vendees

The effect of the Texas decisions upon this subject, of which there are many, is that all the title of

Jordan and wife, and all the title of John E. Roller, whatever he had, were foreclosed and ordered to be sold under McClintic & Procter's judgment against John E. Roller and was sold at sheriff's sale, when Williams bought for himself and Jackson, and conveyed a good and valid title, provided the citation served upon Roller was due process within the meaning of the Fourteenth Amendment to the Constitution of the United States; and this is the only question in this case. The Hollys are not complaining, and could not in this Court.

The proposition quoted by Appellant from Reno we are not disposed to challenge as abstract propositions of law, but we submit with due respect that they do not apply to the facts of this case. In the case of Pennoyer vs. Neff, Mr. Justice Field, speaking of the validity of constructive service by publication, says: "Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, *or of some interest therein, by enforcing a contract or lien respecting the same.*" (Italics ours.) Further on he says that in the broader sense of proceedings in rem, are included, "Such cases (as those) commenced by attachment against the property of debtors or instituted to partition real estate, foreclose a mortgage or enforce a lien. So far as they affect property in the state, they are substantially proceedings in rem in the broader sense which we have mentioned."

It is urged that the case of Savage vs. Fairman, 53rd Tex., p. 601 is an authority for the proposition that in a suit by a vendor against his vendee upon purchase money notes he gives for land, where the vendee has again sold the land to a second purchaser with notice of the lien held by the original vendor, the second vendee not being a party to the suit, the

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judgment recovered is in effect a personal judgment. The case does not so hold, but it declares that the original vendor may make the second vendee a party to a second suit in which the sale under the first judgment may be set aside, and the credit on the execution cancelled, *the plaintiff being the purchaser of the land*, at the sheriff's sale under the original judgment, and in the second suit he may have a personal judgment on his note, with a foreclosure of his vendor's lien against his vendee, and a foreclosure of his lien against the second vendee. So far as the judgment in both suits is concerned, it is a personal judgment against the first vendee for money, and a judgment in rem or quasi in rem against the land. The case can not be tortured so as to support the proposition that a judgment of a foreclosure of a vendor's lien in Texas is a judgment in personam and not in rem. It in fact oparates upon land to subject it to the satisfaction of an established debt, and to transfer the title thereto by sheriff's sale, if that becomes necessary. In the 53rd Texas case Fairmann brought his second suit to get rid of Fannie Savage's apparent title from Walter Savage. As Fairmann was the purchaser under the judgment against Walter Savage, there could have been no objection to the second suit that was brought, or to the form in which he brought it, but he could, instead of pursuing the course he did, have brought an action of tresspass to try title against Fannie Savage and maintained it according to the authority of Foster vs. Powers, 64th Tex., p. 247, and if a stranger had bought the land instead of Fairman, he would have been driven to sue Fannie Savage in an action of tresspass to try title or ejectment. The title to the land passed to Fairman in the sale under his first judgment. It was an action in rem or quasi in rem—it was a foreclosure of a vendor's lien on land, and has all of the elements of a judgment in rem in

its broader sense, as stated by Justice Field in Pennoyer vs. Neff, supra.

In the later case of Arndt vs. Griggs, 134 U. S., p. 316, the validity of a statute of Nebraska, which provided service by publication upon nonresidents "in actions which relate to or the subject of which is real or personal property in this state, when any defendant has or claims a lien or interest, actual or contingent, therein, etc.," was upheld by this Honorable Court. While this section of the Nebraska statute was not under review in this case, another section providing for service by publication on non-residents when the action was to quiet title was passed on, yet it is clear from the reasoning of the court that it would hold all the sections of the Nebraska statute providing for service by publication as valid, as due process within the meaning of the Fourteenth Amendment to the Constitution of the United States, and that the states have a right to enact such legislation. [See the case referred to in Arndt vs. Griggs.]

The difference between the Texas statute, Art. 1230, which we have quoted above and the Nebraska statute, is that in all actions of whatever character or form, without describing them, in Texas, except, of course, such actions as are not in rem or quasi in rem, as in the case of Pennoyer vs. Neff, there may be valid service out of the state, while in the Nebraska statute the particular actions are described in which service by publication may be had. This can not affect the principle. If the legislature of a state can by giving a definition of an action in rem authorize the recovery of a judgment in personam upon constructive service by publication, as it could evade the force and effect of the Constitution of the United States and the decisions of the Supreme Court thereunder. The Texas statute is general and applicable

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to all cases which under the Fourteenth Amendment to the Constitution permit constructive service. It cannot with any semblance of correctness be said that at the time of McClintic & Procter's suit against John E. Roller there was no legislation in Texas which authorized the service of Roller in Virginia, because the Texas Statute does not, like the Nebraska statute, mention or describe the special cases by name in which service by publication may be had; but the proper construction of our statute is that constructive service is good in all cases only in which they "*affect property in this state,*" whether the action be to quiet title, to recover land under an action of tresspass to try title, to foreclose a mortgage or enforce a lien, to partition land and possibly other actions which relate to the transmission of title to land in this state. The failure of the Texas statute to describe the cases in which there may be constructive service is no argument or reason for saying there can be no constructive service in those cases in which the Constitution of the United States and the Fourteenth Amendment do not prohibit it.

It is universally true, we believe, that the legislature of a state has a right to prescribe the mode of transferring real estate situated within its limits, and if it has, it would seem to result logically and inevitably that it has a right to declare in suits affecting its transmission by judicial sale, what sort of process shall be requisite to bring the parties, although non-residents, into court. It has a right to prescribe the proceedings by which this end is to be attained; otherwise the sovereignty of the state over her soil vanishes.

We think that Appellant's citation of authorities are not fortunate. In the case of Hollingsworth vs. Barber, 4th Peters, p. 474, the Supreme Court decided as a matter of law and of fact that there was

We believe the judgment and foreclosure proceedings in McClintic & Procter's suit to be valid, that Jordan and wife's title and Roller's title passed by sheriff's sale to H. W. Williams, and that the Defendant Peeples now has the title to the land in controversy.

Respectfully submitted,

W. F. Jackson
H. W. Williams
Jos. E. Peeples